

Private foundations; advance approval of investment procedures. The Service cannot issue a ruling that use of a proposed investment procedure by a private foundation will preclude imposition of tax under the provisions of section 4944 of the Code.

Advice has been requested whether the Internal Revenue Service can issue a ruling that use of a proposed investment procedure will preclude imposition of tax under the provisions of section 4944 of the Internal Revenue Code of 1954 on a private foundation described in section 509(a).

Section 53.4944-1(a)(2)(i) of the Federal Excise Tax Regulations provides that a determination as to whether the making of a particular investment jeopardizes the exempt purposes of a foundation shall be made on an investment by investment basis, in each case taking into account the foundation's portfolio as a whole. The determination whether the investment of any amount jeopardizes the carrying out of a foundation's exempt purposes is to be made as of the time that the foundation makes the investment and not subsequently on the basis of hindsight.

In addition, these regulations provide that an investment shall be considered to jeopardize the carrying out of the exempt purposes of a private foundation if it is determined that the foundation managers, in making such investment, have failed to exercise ordinary business care and prudence, under the facts and circumstances prevailing at the time of making the investment.

The above provisions of the regulations are supported by Senate Report No. 91-552, 91st Cong., 1st Sess. 46 (1969), 1969-3 C.B. 423, 453, which provides that the determination of whether investments jeopardize the carrying out of the foundation's charitable purposes is to be made as of the time of the investment, in accordance with the 'prudent trustee' approach.

In light of the requirements that the determination of whether an investment is a jeopardy investment is (1) to be made on an investment by investment basis, and (2) is to be made as of the time of the investment, approval of an investment procedure governing investments to be made in the future is not possible. Such approval of investment procedures would constitute a determination prior to the investment and also would not be on an investment by investment basis. Furthermore, advance approval of such procedures would necessarily preclude application of the 'prudent trustee' approach.

Accordingly, the Service cannot issue a ruling that a proposed investment procedure will preclude imposition of tax under the provisions of section 4944 of the Code on a private foundation.